SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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No.

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled matter on January 23, 1974.

I

REFERENCE TO REPORTED DECISION BELOW

The decision below (not yet officially reported) appears in 490 F.2d 921 (Ct. Cl. 1974). A copy of the decision is appended to the present petition.

II

REASONS FOR JURISDICTION

The decision below, dismissing the petition of plaintiffs, petitioners herein, was rendered January 23, 1974.

The reasons for the jurisdiction of the Supreme Court to review on certiorari the instant judgment of the Court of Claims under 28 U.S.C. § 1255 and Rule 19.2 are: (1) that the Court of Claims has decided important questions of federal law which have not been but should be settled by the Supreme Court, namely, the correct construction in several major respects of a federal overtime statute in relation to the work of operating employees of the Alaska Railroad; and (2) that the Court of Claims has decided a federal question in a way in conflict with applicable decisions of the Supreme Court, namely, by construing the said statute as allowing the railroad to employ an artificial formula rather than actual hourly earnings, which were substantially greater, in determining the basic rate in overtime calculations required by the said statute.

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether in calculating overtime under a federal statute specifying overtime at not less than one and one-half times the basic hourly rate of pay, the employer may fix such basic hourly rate by a contract formula substantially below actual hourly earnings, thereby producing far lower overtime pay than would the real earnings.

2. Whether, where the Court of Claims has previously held that certain special payments to railroad employees (called arbitraries) for extra work not

otherwise compensated, onerous work, stranding or detention away from home, deadheading, and the like, should not be set off against overtime pay otherwise due under the statute, the employer may so set them off pursuant to contract.

3. Whether, where the statute grants overtime pay for overtime work in excess of 8 hours a day or 40 hours a week, the railroad may by contract limit its payment to the greater of the daily or weekly overtime, instead of paying overtime for hours exceeding 8 in a day during the first 40 consecutive hours, and for all subsequent hours exceeding 40.

4. Whether, where the statute prescribes overtime pay for hours of duty in excess of 40 a week during standby or on-call status, extra-board employees of the railroad are entitled to such overtime pay when they are required, against a stated guaranty, to be on 1½ hours call 24 hours a day, 7 days a week, with no rest day.

IV

STATUTE INVOLVED

§ 23 (Proviso clause), 48 Stat. 522 (1934), 5 U.S.C. [1954 Ed.] § 673c, as amended by § 201, 76 Stat. 360 (1962), 5 U.S.C. § 5544:

§ 5544. Wage-board overtime and Sunday rates; computation

(a) An employee whose basic rate of pay is fixed and adjusted from time to time in accordance with prevailing rates by a wage board or similar administrative authority serving the same purpose is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who

regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:

(1) If the basic rate of pay of the employee is fixed on a basis other than an annual or monthly basis, multiply the basic hourly rate of pay by not less than one and one-half.

(2) If the basic rate of pay of the employee is fixed on an annual basis, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

(3) If the basic rate of pay of the employee is fixed on a monthly basis, multiply the basic monthly rate of pay by 12 to derive a basic annual rate of pay, divide the basic annual rate of pay by 2,080, and multiply the quotient by one and one-half.

An employee subject to this subsection whose regular work schedule includes an 8-hour period of service a part of which is on Sunday is entitled to additional pay at the rate of 25 percent of his hourly rate of basic pay for each hour of work performed during that 8-hour period of service.

(b) An employee under the Office of the Architect of the Capitol who is paid on a daily or hourly basis and who is not subject to chapter 51 and subchapter III of chapter 53 of this title is entitled to overtime pay for overtime work in accordance with subsection (a) of this section. The overtime hourly rate of pay is computed in accordance with subsection (a) (1) of this section. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 486; Pub.L. 90-83, § 1(26) (A), Sept. 11, 1967, 81 Stat. 200.

As amended in 1972, § 5, 86 Stat. 573, 5 U.S.C. [1974 pocket] § 5544, the words "basic rate of" were eliminated from line 1 of the text as given above. This amendment, as well as insertion of an additional class of subject persons, does not appear to affect the issues.

V

STATEMENT OF THE CASE

Petitioners are employees of the Alaska Railroad, which is the property of the United States, and is managed at present by the Secretary of Transportation. They have been assigned to a so-called extra board, which requires them to stand by for work calls 24 hours a day, 7 days a week, with no rest days. Their petition to the Court of Claims raised questions concerning overtime properly payable to them pursuant to § 23, 48 Stat. 522 (1934), 5 U.S.C. [1934 Ed.] § 673c, as amended by § 201, 76 Stat. 360, (1962), 5 U.S.C. § 5544 [hereafter § 5544]. They complained that by administrative order and contract, the railroad has unlawfully deprived them of material amounts of overtime pay due them.

A. DESCRIPTION OF THE DUAL SYSTEM.

The pay system effective on the Alaska Railroad, known as the dual system, has the following features relevant to the proceeding:

1. Miles Versus Hours.

The dual system offers operating personnel payment either by hours worked or miles run in the day or week, whichever is greater. The historical basis reverts to a time when trains averaged 12½ miles per hour, or 100 miles in an 8-hour day, with the rate of

pay stated in cents per mile.[1] In that case, pay would be identical whether stated in hours worked or miles traversed: (1) 100 miles x 30¢ per mile = $30.00 a day; (2) 30¢ x 12½ = $3.75 an hour x 8 hours = $30.00 a day. If the train actually took 6 hours to cover 100 miles, pay on a time basis would be 6 x $3.75 = $22.50; here the dual system would allow payment on the basis of distance covered, or $30.00. If the train took 10 hours, payment on a time basis would be 10 x $3.75 = $37.50, as compared with the mileage pay, which remains $30.00; here the dual system would allow payment on the time basis. In practice, higher modern train speeds in almost all instances dictate that miles will yield the higher pay even in the difficult conditions experienced in Alaska. This is certainly true of distances more than 100 miles, and although time theoretically controls lesser distances, because of minimum guaranties, the number of such runs in the illustrative record before the Court of Claims was negligible. The average road trip was 226 miles, and the average train speed nearly 20 miles an hour.

2. Straight Time, Overtime and Arbitraries.

a. Real and Conventional Mileage.

Predominance of actual speed greatly exceeding 12½ miles per hour not merely causes mileage to become the regular basis of payment, but throws the

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[1] From the reports of earlier litigation, it appears that it had been the practice, for payroll calculation, to convert miles to payable hours in the ratio of 12½ miles to the hour. At present it is the practice to pay on the mileage basis. This is followed even where distance is not involved. Thus yard pay, which is based solely on time and is no way related to distance, is nominally expressed in terms of miles, with a rate per mile multiplied by a fixed ratio of 12½ miles per hour.

nominal time formula, based on 12½ miles an hour, out of congruence with true average earnings from road work. The real average experience in the record was 60% greater than the conventional mileage represented in the contract formula.

b. Overtime.

The dual system has provision for two alternative forms of overtime pay, weekly and daily. The former applies to yard work and to mixed yard and road work; the latter is applicable only to road work.

Overtime in yard service is allowed at one and one-half times for hours exceeding 40. For mixed service, actual hours worked (including deadheading) are compiled, and separately actual miles run each day (but including at least 100 miles for each day on which actual miles are less than that number, each day in yard service, and each day on annual or sick leave); overtime is allowed at time and one-half (but only straight time for passenger service) for each hour exceeding the quotient for miles so credited divided by 12½, provided at least 40 hours have been worked.

It is observable that under this formula the more miles run the less likely is overtime to be earned; however, the employee retains, albeit at straight time, his full pay for actual miles— and, strikingly, the allowances for non-working time, which the railroad declined to incorporate in the base for calculating statutory overtime.

The alternative daily method of computing dual-system overtime for road work is to pay time and one-half (straight time for passenger service) for overtime, which begins (1) on runs of 100 miles or less,

after 8 hours, and (2) on runs over 100 miles, after time on duty exceeds the quotient of miles run divided by 12½. In the latter case again, the longer the run the less likely is overtime to be earned. In the illustrative record before the Court of Claims, the principal road runs were Anchorage-Healy, 244 miles; Anchorage-Fairbanks, 356 miles; and Anchorage-Seward (round trip), 228 miles. Overtime could accrue under the rule only after 28 hours, 20 hours and 18 hours, respectively. The longest elapsed time for any one of these runs was about 16 hours, which was also the legal limit for hours in a single day. Even on shorter runs where overtime is arithmetically possible, it necessarily begins well after 8 hours. A frequent run in the record was Anchorage-Whittier, about 125 miles, for which overtime commences only after 10 hours under the rule (125 miles divided by 12½ = 10 hours).

Of the 321 hours that the particular plaintiff whose record was before the Court of Claims worked in excess of 8 hours a day on 58 round road trips during the test year the railroad recognized only 44 hours as dual-system overtime, or 15%.

Not merely does overtime accrue inversely to distance under the dual system, but the rate of straight-time pay actually diminishes with distance. Road pay consists of a basic rate for the first 100 miles in a run, and a "mileage" rate for miles in excess of 100 less by 13% on average than the basic rate.

c. Arbitraries.

The dual system provides additional compensation in a number of circumstances similar, allowing for the

railroad mystique, to those obtaining in other industries. The term for these allowances is "arbitraries". They classify into allowances (1) for especially difficult or onerous work (e.g. multiple-unit pay for extra locomotives and cars); (2) for work outside defined job duty (switching or train preparation by road crew, or road service by yard crew); (3) for preempting what would otherwise be free time or legally required rest time (by assigning work, by stranding or detention at distant points, or various forms of delay in operation); and (4) for failure to provide expected work ("run-around" scheduled man, or failure to use a man called for duty). Some of these arbitraries are for non-working time, but many others represent payments for actual work, whether in time already compensated or in time not otherwise compensated.

The arbitraries constitute a significant factor in the illustrative record before the Court of Claims, representing about 16% of total pay.

3. Extra Board.

The railroad maintains stand-by crews on "extra boards" whose function is to act as substitute or additional crew in all branches of train work. The principal features of the extra board are (1) the men listed are on 1½-hours notice to report 24 hours a day, 7 days a week with no rest day; (2) against their guaranteed pay of not less than 1200 miles per two-week pay period at freight-service rate is set off, by way of penalty, time lost at the rate of 100 miles a day, while missing a call also entails being held off the board for 24 hours, and returning at the foot of the list; (3) also set off against this guaranty is all pay from assigned work, including arbitraries, straight time and overtime.

B. RELATION OF § 5544 TO DUAL SYSTEM.

In a series of cases culminating in Samples v. United States, 135 Ct. Cl. 548 (1956), the Court of Claims determined that the forerunner of the present §5544 (§ 23, Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. [1954 Ed.] § 673c) applied both to operating and non-operating employees of the Alaska Railroad, and entitled them, in its then form, to overtime pay for hours exceeding 40 a week. In order to preserve the dual system, the Court said that since the overtime statute is based on hours worked, pay on a time basis with overtime at the rate of 150% should be compared with earnings from mileage under the dual system, and the greater of the two awarded. It also held that arbitraries should not be included in the base rate, but equally that, except for any themselves in the nature of overtime, they should not be set off against statutory overtime. In the judgment, therefore, arbitraries were included by the Court on both sides of the comparison between dual-system earnings and statutory overtime.

C. NATURE OF PETITIONERS' COMPLAINT BELOW.

In the present litigation, petitioners complained that pursuant to certain illegal contractual practices, the railroad has contrived to avoid substantially all payment of statutory overtime. These practices petitioners described as follows:

1. The Contract Formula Establishing the Basic Rate Is Far Below Actual Hourly Earnings.

In calculating statutory overtime for road work, the railroad has determined the "basic rate" by an artificial formula that reflects only 65% of actual hourly earnings. This formula gives employees credit for

only 12½ miles in the hour, whereas according to the illustrative record before the Court the actual average road experience was nearly 20 miles an hour. In dollars, allowing for different rates per mile for different classes of work in the case given, this meant that the railroad was employing a base rate for overtime of about $3.77 an hour, against actual earnings of about $5.77, and a corresponding overtime rate only 65% of what such actual earnings required.

2. Arbitraries Have Been Set Off Against Statutory Overtime.

Notwithstanding the ruling in Samples that arbitrary payments, although not to be included in the base rate, should not be set off against statutory overtime, the railroad has consistently since then followed the practice of paying arbitraries only under the dual system, and has refused to pay them if, and only if, statutory overtime were payable. It was admitted below that this had the effect of setting off the arbitraries against such overtime.

3. Only the Greater of Weekly or Daily Overtime Is Deemed Payable.

The railroad has also followed the contractual practice of calculating statutory overtime payment on the basis of daily or weekly overtime, "whichever is greater". This means in effect that it guarantees itself five 8-hour days at straight-time wages in weeks extending five days or more, although it frequently exacts 40 hours in fewer than five days.

4. No Overtime Is Paid for Stand-by Exceeding 40 Hours.

Finally, the railroad has refused to pay extraboard employees overtime in accordance with § 5544 for

standing by in excess of 40 hours per week (less the statutory exception for eating and sleeping time).

D. THE DECISION BELOW RESOLVED ALL ISSUES AGAINST PETITIONERS.

Following cross motions for summary judgment, the Court of Claims on January 23, 1974 granted the railroad's motion, and dismissed the petition.

(1) The Court held, with respect to the overtime formula, that the statutory language is not "compelling" that the contract basic rate must reflect real earnings, Appendix at 7, 490 F.2d 921, 925, and that so to require "plausibly" might "destroy the dual system beyond the possibility of preservation." App. at 5, 490 F.2d at 923. (2) With respect to the set-off of arbitraries against statutory overtime, the Court held that an employer bound by statute to pay overtime may "recompense himself by curtailing benefits in other areas not prescribed by statute." App. at 9, 490 F.2d at 926. (3) As to pay for daily and weekly overtime, the Court sustained the defendant's practice of paying the greater of them on the ground that to give effect to both would produce "absurd and whimsical results". App. at 12, 490 F.2d at 928. (4) Finally, the Court denied petitioners any overtime for excess standby time on the grounds that "they are not paid to wait", and that their waiting time does not represent working time. App. at 10, 490 F.2d at 927.

VI

ARGUMENT

A. THE STATUTE REQUIRES THE BASIC RATE TO REFLECT ACTUAL HOURLY EARNINGS.

In actual experience, drawn from the illustrative record, the dual system yielded average earnings of $5.77 an hour for road work. The artificial contract formula would have amounted to $3.77 an hour (12½ multiplied by roughly 30 cents a mile).

Under all the decisions construing the statutes of this class, it is settled that the actual hourly earnings constitute the basis for calculating overtime, and that a contractual formula cannot be given effect if it does not represent actual earnings. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216 (1942); Walling v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11 (1944); United States v. Rosenwasser, 323 U.S. 360, 65 S. Ct. 295 (1945); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945); Walling v. Harnischfeger, 325 U.S. 427, 65 S. Ct. 1246 (1945); 149 Madison Ave Corp. v. Asselta, 331 U.S. 199, 67 S.Ct. 1178 (1947).

The Court of Claims rejected the principle that actual hourly earnings must control the overtime calculation in the case of road employees of the Alaskan Railroad. The opinion advances several different reasons for this result, some of which it seems itself to doubt, although reflecting their influence.

1. This Court's Decisions Require That Overtime Be Based on Actual Hourly Earnings.

The opinion cites decisions of this Court holding "that a bargained regular rate of pay must yield

before a calculation of actual earnings per hour worked". Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580, 62 S.Ct. 1216, 1221 (1942); Walling v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11 (1944); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 65 S.Ct. 1242 (1945). It notes that Youngerman-Reynolds required piece-work rates actually paid to prevail over a nominal contract rate.

The Court of Claims then goes on to mention Walling v. Belo Corp., 316 U.S. 624, 62 S.Ct. 1223 (1942), although it is unclear to what extent it considers that decision controlling. On its face, the present case is not a Belo situation at all. The rates actually paid here are not a fixed weekly or even daily salary alleged to comprise in one sum the true basic rate and a lawful overtime for a stated number of overtime hours (54 hours in Belo, and now 60 hours under § 203(e), F.L.S.A.), after which the contract overtime becomes payable. Here the wages actually paid are piece-work rates for miles in fact traversed in the working day, governed by the speed of the train, and no one suggests that they are not greater than the contract formula for calculating overtime.

The Court of Claims acknowledges that even as to piece-work rates, § 7(f)(3), Fair Labor Standards Act, 52 Stat. 1063 (1938), 63 Stat. 912 (1949), 29 U.S.C. § 207(f)(3), any agreed contract formula must be "substantially equivalent to the average hourly earnings of the employee", App. 6-7, 490 F.2d at 924; but it holds that that provision, which it apparently recognizes would be conceptually controlling, amended only the F.L.S.A., and does not apply to § 5544.

But nothing is clearer than that this particular amendment only codified existing law. The Supreme Court had several times before then held that true earnings must control even where piece-work is involved.[2]

The most striking instance bears a close resemblance to the system involved here. In Walling v. Harnischfeger Corp., 325 U.S. 427, 65 S.Ct. 1246 (1945), the pay scheme superimposed upon a standard minimum hourly payment certain additional piece-work payments scaled to speed in performance. Under the dual system, too, the miles involved in an assigned run over 100 miles represent the maximum payment, and it is to the interest of the operating worker to cover the distance in the least time. The whole incentive lies in maximizing speed, since extra time does not bring extra pay; but that very fact tends to raise the hourly earnings: the more surely the incentive succeeds in its purpose of reducing the time spent, the more it necessarily increases the hourly earnings. In Harnischfeger, the Supreme Court held that it is those aug-

[2] The Court of Claims commits another odd mistake: "We note that the statute here involved speaks in terms of a 'basic' rate of pay. The word 'basic' not being found in the Fair Labor Standards Act." App. 6, 490 F.2d at 924. Yet the word and the concept appear in the very clause of the F.L.S.A. that the Court cites in its next sentence "(or if a special agreement establishes the *basic rate* for overtime) the rate shall be . . . substantially equivalent to the average hourly earnings . . . over a representative period of time." [Emphasis supplied.] Besides, the Walsh-Healey Act, 49 Stat. 2036 (1936), 56 Stat. 277 (1942), 35 U.S.C. § 35(c), also contains the expression "basic hourly rate received", and the Department of Labor has since 1953 held that this expression means the same as "regular rate" in the F.L.S.A. 41 C.F.R. § 50-201.103 (b); § 42(a)(4), (d)(1), Rules and Interpretations No. 3 (January 31, 1961).

mented hourly earnings which must prevail in establishing the relevant overtime base.[3]

In fact, the Court of Claims misconstrues the meaning of the Belo [§ 203(e)] and § 207(f) "exceptions". In both cases, in order to establish stability in highly irregular situations[4] Congress has permitted the parties to agree respectively on a fixed weekly salary or piecework formula; but in both cases it has demanded that the agreement substantially approximate real earnings. The whole controversy in Belo and in Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 67 S.Ct. 1056 (1947), turned on whether the contracts there involved complied with that requirement. But the requirement remained intact and integral.

In the present case, the contract rates are said by the Court of Claims to control the earnings "for a large

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[3] Harnischfeger resembled the railroad dual system in another significant respect: "And when an incentive worker is temporarily assigned to 'non-incentive' work he is paid at least 20 percent more than his basic hourly rate." 325 U.S. at 429. In the illustrative record before the Court of Claims, the rates "per mile" for railroad operating assignments with a fixed situs (yard and roundhouse work) were for a conductor about 27% higher than for freight road service, and for a brakeman about 21% higher. The fixed-situs rate "per mile" is multiplied by 12½ to produce an unchanging hourly rate. It is obvious that what may be termed the higher productivity of road men (i.e. more *actual* miles traversed in the hour and day) is intended to bring the pay for both into relative equilibrium, with an advantage for the much more arduous road work. The rule approved by the Court of Claims defeats this intention, and would leave road men with much lower wages than yard men.

[4] The courts have held that the irregularity in Belo cases must be as to the hours below 40, and not merely in the overtime hours. Foremost Dairies v. Wirtz, 381 F.2d 653 (5 Cir. 1967), cert. denied sub nom. Home Town Foods v. Wirtz, 390 U.S. 946 (1968).

number of the hours worked". App. 6, 490 F.2d at 924. Here again it is impossible to know the basis for this conclusion, since the case was decided on motion for summary judgment, and petitioner's allegations of fact were to the contrary. In the agreed illustrative record before the Court one plaintiff's road trips as brakeman and conductor (excluding any involving deadheading or the Whittier arbitrary discussed below) averaged 226 miles, which occupied an average of 11.62 hours. The average miles covered in an hour amounted therefore to 19.45. The contract rate is 12.5 miles an hour. The actual average hourly earnings were $5.77 (exclusive of arbitraries); the contract rate would have yielded $3.77 an hour. That is the characteristic difference for roadwork between the real and the hypothetical, and explains why no overtime pay ever accrued under the railroad's interpretation of the statute, which the Court approved.[5]

2. Overtime Based on Actual Earnings Would Not Destroy the Dual System.

Another factor in the Court's ruling was its apprehension, App. 5, 490 F.2d at 923, that the dual system might be destroyed "beyond the possibility of preservation" if overtime were paid on the basis of real earnings. The Court admits that this is only the opinion of intervenors, and it is certainly not based on a record, since the case was decided on motions for summary judgment. The same contention was ad-

[5] Real earnings at $5.77 an hour would under the dual system total $67.15 for the average working day of 11.62 hours without overtime (not counting additional earning from arbitraries). Against this, eight hours at $3.77 yields $30.17, with overtime of 3.62 hours at $5.66 (150% of $3.77) producing $20.48, for a total "statutory" pay of $50.65.

vanced by the railroad in Samples as an argument against paying any overtime at all under § 5544, and was squarely rejected by the same Court, 135 Ct.Cl. at 552. The only aspect that would be affected is overtime; the dual system would continue to control all other aspects of railroad remuneration. Indeed, adoption of petitioner's construction would render the dual-system earnings an indispensable part of the statutory overtime calculation, and bind the two together more closely than ever.

Further, Samples established the rule that dual-system mileage should be compared with earnings on a time basis under the statute. If the parties decided to follow the theory of §203(f), F.L.S.A., supra, and to agree on a realistic contract mileage rate per hour corresponding to the real average earnings, there would be many instances in which, where train speed exceeded the average, the dual-system earnings would continue to exceed the agreed average rate. From inspection of the illustrative record, it appears that this would have been true for 29% of the road trips made by the particular plaintiff in the year studied, employing as the statutory formula actual average straight time earnings of $5.77 an hour and overtime of $8.66. The more efficient (that is, the faster) the operation became, the more dual-system earnings would be likely to prevail over even a realistic statutory formula. This is the sort of comparison the Samples court had in mind, not one that automatically excluded statutory overtime from any practical application.

If on the other hand the suggestion is that correctly calculated overtime represents too much money, as to which there is not the slightest evidence of record, it can

only be replied that this is the consequence of the underlying Congressional intention. Overtime is intended, this Court has said, to cost at least 50% more than the real basic rate of pay. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 423-424, 65 S.Ct. 1242, 1244 (1945); Walling v. Helmerich & Payne, 323 U.S. 37, 40, 65 S.Ct. 11, 13 (1944); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-578, 62 S.Ct. 1216, 1220 (1942). Since the extra cost of overtime is an expense that Congress must be deemed to have contemplated in enacting § 5544, and since overtime is controllable by administrative policy, there seems to be no basis—certainly none in the record—for the inference drawn by the Court of Claims.

3. Petitioners Neither Seek Nor Would Receive a Windfall From Correct Overtime.

The Court says that petitioners are "seeking a windfall . . . that would not have befallen them, had the railroad construed the law correctly all along." App. 5, 490 F.2d at 923. Petitioners seek only what *would* have befallen them had the railroad construed the law correctly all along. How this constitutes a windfall the Court of Claims does not explain.

4. Variations in Basic Rate Resulting From the Nature of the Work Do Not Authorize Substituting an Artificial Rate.

The Court seems to find objectionable (although not decisive, apparently) "that under plaintiffs' theory an operating employee's basic hourly rate would be a different figure for every train journey he took." App. 5, 490 F.2d at 923-924. Of course the genius of the dual system is precisely that hourly earnings differ with each journey, simply because train speeds in Alaska cannot be standardized even on identical

itineraries, and differ even more decidedly as between different itineraries. The dual system is in this respect typical of all piece-work and other incentive payment systems. The Supreme Court has repeatedly held that such variations in hourly earnings must be given full effect in the base for calculating overtime. Walling v. Harnischfeger Corp., 325 U.S. 427, 432-3, 65 S.Ct. 1246, 1249 (1945); Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460-2, 68 S.Ct. 1186, 1194-5 (1948); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580, 62 S.Ct. 1216, 1221 (1942); Walling v. Belo Corp., 316 U.S. 624, 632, 62 S.Ct. 1223, 1227 (1942).

Moreover, if variableness were a significant factor, and if to contract for a definite overtime formula were deemed to cure the defect, the parties could readily negotiate a formula based on real average earnings experience. The virtue of definiteness does not reside exclusively in an unreal formula that never comes into play.

5. The Samples Decision Did Not Decide the Question Against Petitioners.

The Court mentions the failure of Samples to pass upon the point, which it notices was not squarely presented, and that "it appears" that decision was based on the 12½ mile an hour rate. App. 5, 490 F.2d at 924. It is doubtful that the earlier decision was based on this formula. If the decision did approve "as to that particular, an administrative practice already 11 years old", it was in a much different sense that sustains the contention of the present petitioners. It was then the practice to translate miles travelled into payable hours, for wages were at that time paid on an hourly basis; in all the numerous tables, *actual* miles traversed were divided by 12½ to derive "payable

hours" for wage purposes;[6] obviously the men were thereby paid for *all* the miles they earned.[7] This is very different from the proposition that they shall be paid for only 12½ miles in each payable hour but that there shall be only eight payable hours in the straight-time day. To petitioners it seems that the Samples Court implicity directed continuation of the then existing method of calculation.[8] However, this is admittedly not decisive on either side.

6. The Statutory Duty To Base Overtime on Actual Earnings Is Not Vitiated Because Arbitraries Are Excluded from the Basic Rate.

The Court below seemed to find a fatal inconsistency in the failure of petitioners to "crank" arbitraries into the basic rate. Yet it notes that this would have been clearly contrary to Samples. App. 7, 490 F.2d at 924-925. The Court's original reason for excluding arbitraries was apparently that it understood that they did not "represent hours worked" or were "pay for

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[6] ". . . one hour at an average operating speed of 25 miles per hour appears in the payroll records as two hours or 25 miles paid for." 135 Ct. Cl. at 593; and see tables at 581, 594, 595. The dual system to this day follows the same method in calculating its own limited overtime. In translating miles to time for that purpose, it divides miles actually run by 12½, and pays overtime for hours exceeding the quotient. Although this overtime formula falls short of statutory requirements, it assures the employee of his full basic earnings by paying all actual miles run as straight time.

[7] ". . . the hourly earnings . . . in trains travelling 12½ miles per hour or faster increase as the speed of the train increases." 135 Ct. Cl. at 583.

[8] ". . . the amount earned will be the greater of the amount earned and paid on a mileage basis or the amount *earned* including section 23 overtime . . ." 135 Ct. Cl. at 552. [Emphasis supplied.]

something extra which he did during the time that he was already working and being paid." 135 Ct. Cl. at 551. Petitioners pointed out below that the arbitraries also include compensation for service not otherwise compensated in the mileage system (which pays only for and during actual train movement), such as switching by train crews when yard crews are not provided, or writing train orders at distant stations where the railroad prefers not to station a telegrapher; and also what may be termed job-differential compensation for especially onerous work. Some of these arbitraries ought theoretically, therefore, to be included in the base rate. Others would probably not be includible. And some would be a proper offset against statutory overtime as in themselves essentially constituting overtime pay. However this may be, it is the simple fact, as the Court naturally admits, that it had already totally excluded them in Samples. Nor does it seem at all clear why failure to include the arbitraries in the base rate, whether right or wrong, should render inapplicable the general rule that such base rate must incorporate at least undisputed actual earnings.

B. ARBITRARIES CANNOT LAWFULLY BE SET OFF AGAINST STATUTORY OVERTIME.

The Court of Claims in Samples v. United States declared that arbitrary payments should not be included in calculating the basic rate for overtime; but it also held that except for such as represented overtime, they should not be set off against the statutory overtime. 135 Ct. Cl. at 552. Employees were therefore to retain arbitraries (other than dual-system overtime) in addition to receiving what was due under

§ 5544. The sense of the holding was that dual-system compensation, *with* arbitraries, fails to satisfy statutory overtime requirements.

In the decision under review, the Court of Claims holds that the railroad may command a choice between overtime *without* arbitraries and straight time *with* arbitraries, knowing that this means no overtime will be paid.

The Court says that the arbitraries are not required by statute, and that the railroad may cancel them either unilaterally or by contract. "There is no law cited to us that an employer who concedes the statutory right may not partially recompense himself by curtailing benefits in other areas not prescribed by statute." App. 9, 490 F.2d at 926.[9]

But the defendant railroad did not abolish either the arbitraries or the dual system as a whole. Its managers continued the system. They proceeded to manipulate it to circumvent Samples by making overtime arithmetically impossible. They said, When and only when overtime is otherwise due under the statute, we shall reduce your wages by more than enough to offset it, and you may choose which you will have. The result has been that no overtime has been paid under the statute.

Was Samples then completely delusory? An employer may cut wages, arguendo; but may he entirely defeat the overtime law by arranging that overtime shall never accrue by the simple device that it shall be

[9] The Court even intimates that the question might not be different "If his position had the look or smell of assessment of a penalty for assertion of the right." Id.

more than offset [10] by concomitant cuts elsewhere, which cuts shall be effective only as against overtime?

To allow this is to allow evasion of the overtime laws by the most transparent of devices. Nor is it any answer that the union representative accepted this "to save a system of compensation he thought more advantageous than the statutory system". App. 9, 490 F.2d at 926. Obviously, there was very little choice between accepting the existing system and claiming a delusory overtime compensation that was really a net cut in pay. The Court itself admits that "a pay system that violates the statute is not saved if the employees agree to it." App. 8, 490 F.2d at 925.

The Court says that the only way this set-off of arbitraries "can get into the case" is if they are required to be "cranked into the computation of the basic hourly rate"—which it had previously held they can not be.

It is true that many of the most important arbitraries reported in the record represent payment for actual work not otherwise compensated. For instance, under Rule 6(u) the train crew are required to perform switching work on barges at Whittier, a water terminal; they are paid for this work, normally done by a yard crew, on a time basis using road rates per mile, which are as already mentioned (supra, note 3) about 80% of those paid yard men for the same work. The railroad saves at least this difference through using the train crew, who perform the work during the intervals between arriving at Whittier and departing, that is,

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[10] The government conceded below that "(In other words, thereafter, the arbitraries payment would be off-set against statutory compensation.)" Br. 27.

when they are earning nothing from their road work and would otherwise be idle and without pay. This payment, which is for distinct, otherwise uncompensated work whose value is retained by the railroad, the latter deducts from their pay if statutory overtime accrues.

The Samples Court may have been wrong in saying that this arbitrary is not properly to be included in the overtime base. But can the Anderson Court possibly be right in saying that it may properly be *subtracted* from overtime otherwise payable under the statute?

The Court below failed to understand Samples in relation to parallel problems under other overtime statutes, as codified for instance in § 7(d) of the Fair Labor Standards Act, 29 U.S.C. § 207(d). Many of the arbitraries find direct parallels in that section, which is a compendium of items of remuneration to be excluded from the "regular rate" used to calculate overtime. The principle of their exclusion is that they usually do not represent payment for hours actually worked, and Samples distinctly proceeded on that principle. 135 Ct. Cl at 552.

But there is no suggestion in § 207(d) that the excluded items are to be *set off* against proper overtime, except for payments representing or equivalent to overtime, such as are listed in paragraphs (5)-(7); see § 207(g).[11] That was the whole point of Samples. It also excluded arbitraries from the basic-wage com-

[11] Oddly enough, many of the items excluded from the overtime basic rate by § 207, and also Samples, are *included* in the overtime base under the dual system—and not merely items like the Whittier arbitrary, but even minimum guaranties, deadheading, sick and annual leave.

putation, but it disapproved any set-off against overtime except for dual-system overtime. At 552.

The present decision countenances a total offset by a device that, if lawful, would be effective to nullify every overtime law.

C. THE STATUTE REQUIRES OVERTIME TO BE PAID FOR HOURS OF WORK EXCEEDING 8 IN A DAY AND 40 IN A WEEK.

In its present form, § 5544 says that an employee "is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week." In the case at bar, the Court of Claims sustained a practice of the defendant railroad to pay overtime "on the basis of time in excess of 8 hours in a day or 40 hours in a work week, *whichever is greater.*" App. 11-13, 470 F.2d at 927. The expression "whichever is greater" does not appear either in § 5544 or in any of the other federal overtime statutes, and its validity is agreed to constitute matter of novel impression in litigation.

Drawing on the judicially recognized intention of overtime legislation to discourage exploitation of labor and to spread work, and on the historical development of the relation between daily and weekly overtime provisions, petitioners proposed a construction for giving proper effect to both clauses in § 5544.

The statute requires "overtime time pay for overtime work in excess of 8 hours a day or 40 hours a week." The disjunctive does not give the employer a choice between paying overtime either by the day or week, as may suit him. Nor is the meaning improved by seeming to throw the advantage of the choice to the workman, awarding him the greater of the two (as it were, giving him the choice instead of the employer). Either way,

some hours will be worked at straight time that Congress has designated as overtime. Either reading dilutes the Congressional purpose.

Petitioners therefore contended for a construction that gives effect to both clauses. During the first 40 consecutive hours, overtime is to be paid for hours in excess of 8 a day; after the first 40 hours have been worked, including daily overtime, all further work is overtime. This does not constitute pyramiding of overtime upon overtime; no hour worked receives double overtime, but no hour designated by Congress as overtime fails to be compensated as overtime.

The difference between the two readings is simply that the railroad's rule guarantees the employer 40 straight-time hours, although by consuming the first 40 hours in less than five 8-hour days he has in fact worked his men as many hours fewer of true straight time as he has compressed the 40 hours into days fewer than five. This construction makes him a gift of overtime hours at straight-time pay.

The reading of petitioners precludes that result without giving employees advantages not clearly intended by the law.

The reason of the Court of Claims for rejecting this interpretation seems to arise from a single hypothetical example it deems anomalous, but which, with respect, it has not correctly analyzed. It propounds a case in which a man has worked 42 hours, alternately assuming (a) ten hours on Monday, and eight hours Tuesday through Friday, and (b) eight hours Monday through Thursday, ten hours on Friday. The Court thinks the overtime payments in both instances should be the same two hours, apparently on the theory that an employer is

entitled to 40 hours straight time, and "that it is absurd that the employer should sacrifice his ability to get forty hours work at the regular rate if he calls for overtime at the beginning of the week, but not do so if he calls for it at the end." App. 12, 490 F.2d at 928.

Yet that result is by no means open to the Court's stricture of "whimsical and absurd." Id.

Congress has designated as overtime both the hours after eight in a day and after 40 in a week, and the reason is clear. Such a statute as the Fair Labor Standards Act, which requires overtime pay only after 40 hours, guarantees that much straight time no matter how few the days in which they are compressed. But excessive daily hours may come to constitute an abuse that Congress designs to discourage by the eight-hour clause. That was the case with § 5544, which until 1962 had also been a 40-hour law exclusively, and where the absence of pay for daily overtime was felt as a deficiency despite a nominal prescription of an eight-hour working day. See letter of Secretary of Labor to Senate Committee on Labor and Public Welfare, October 11, 1961, Hearings on S.1304, 87th Cong. 17. The reciprocal shortcoming in a strictly daily overtime scheme was illustrated in the Work Hours Act of 1962 (of which the amendment to § 5544 was a part), which amended numerous such statutes because "present 8-hour laws permit the employment of workers on government construction up to 56 hours a week—seven 8-hour days—without overtime compensation." 108 Cong. Rec. 6684 (April 16, 1962); see also 108 Cong. Rec. 14700 (July 25, 1962).

The addition of the missing piece to previous legislation shows that in each case Congress had clearly in

mind the abuse it was seeking to remedy; and simultaneous amendment in 1962 of statutes some of which lacked the daily and some the weekly feature makes this the more striking.

It must be obvious that in the case of a statute with daily overtime, to pay overtime only after 40 hours would flout the daily provision; and in the case of a statute with a weekly overtime, to pay only for hours over eight in a day would be equally to disregard the weekly requirement.

Yet that is the exact effect of paying only the *greater* of daily or weekly overtime. Whichever is paid, the statutory requirement as to the other is flouted. Whichever is paid, the employer receives a gift of hours that Congress has deliberately designated as overtime.

Although no cases in point have been found, Potlatch Forests Inc. v. Hays, 318 F. Supp. 1368 (D. Ark. 1970), looks clearly in the direction here suggested. Where an Arkansas statute required time and one-half to be paid female employees for work exceeding eight hours a day and 48 hours a week, while the Fair Labor Standards Act required overtime in excess of 40 hours a week, Chief Judge Henley resolved the conflict by holding that since the latter act "requires overtime compensation for all hours in excess of forty worked during a given workweek, regardless of how many hours a day are worked," the State eight-hour provision governed "during the first forty hours of each workweek; after a woman has worked forty hours during a given workweek, the Fair Labor Standards Act simply takes over and the Arkansas statute becomes functus officio." At 1370.

The Court's reasoning is instructive because it deals with an eight-hour law and a 40-hour law in their disarticulated form. The same analysis should be applied to a statute in which the two elements are joined: the eight-hour provision functions until 40 hours have been worked, after which the 40-hour provision governs.

However, the Labor Department has followed a different rule in administering the most natural analogy to § 5544, the Walsh-Healey Act, 49 Stat. 2036 (1936), 56 Stat. 277 (1942), 41 U.S.C. § 35(c), which reads: "That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week", with an exception for employers making agreements with employees pursuant to § 7(b)(1) or (2) of the Fair Labor Standards Act, 29 U.S.C. § 207 (b)(1), (2). The disjunctive here is not ambiguous; neither is to be done except under the proviso and upon the payment of overtime.

The regulation of the Department of Labor effectuating the section reads as follows, 41 C.F.R. § 50-201.103 (c):

> "If in any one week or a part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any one day or *after 40 hours in any one week during which no single daily total of employment may be in excess of 8 hours without the payment of the overtime rate.*" [Emphasis added.]

Words could hardly frame more clearly the rule for which petitioners here contend. Until 40 hours, all daily

time exceeding eight hours must be paid overtime, and all hours above 40 must be paid overtime.

Yet the interpretative bulletin of the Department of Labor construes this provision, which dates back at least to 1953, in the sense incorporated in the railroad's rule. In § 42(c) of its Rulings and Interpretations No. 3 (January 31, 1961), under the Public Contracts Act, the Department quotes § 50-201.103(c), and adds:

> "(2) . . . An employee may not be required to work in the performance of a government contract subject to the Act more than 8 hours in any day, or more than 40 hours in any workweek . . . , without payment of the overtime rate of time and one-half for all hours worked in excess of 8 on any day, or in excess of 40 hours in the workweek, whichever is the greater number of overtime hours. For example, if an employee works 10 hours a day for 6 days in a workweek his hours of work in excess of 8 a day would be 12 for the week; but since he worked a total of 60 hours in the week his hours of work in excess of 40 in the workweek would be 20. He must be paid at the overtime rate for 20 hours."

This interpretation is inconsistent with the rule and the statute.

No published explanation has been found, and in itself it is conclusory and unreasoned, and therefore ordinarily entitled to little judicial respect, compare Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). While the practice that has probably resulted under it exerts a definite force, it has never been tested judicially. In the case illustrated, it treats as straight time eight hours that Congress has declared to be overtime, with consequent direct loss to employees.

D. EXTRA-BOARD OVERTIME IS COMPENSABLE UNDER THE STATUTE.

The Court of Claims denied the claim of extra-board petitioners to overtime pay for standing by after 40 hours. As explained, supra, petitioners are required to stand by for call on 1½-hours notice 24 hours a day, 7 days a week with no rest day; and they are subject to financial and disciplinary penalties for missing calls.

1. There Is No Analogy Between Extra-Board On-Call Status and the Fanciful Leisure Situations From Which the Court Derived Its Ruling.

The Court of Claims erred profoundly in likening the situation of petitioners to the leisure-time activities, drawn from another case, of church and theatre-going, shopping, entertaining and other forms of "recreation, diversion, or relaxation that might suit their fancy." App. 10, 490 F.2d at 926.

The Court admits it denied petitioners opportunity to present evidence from which could have been gathered the real meaning of standing by to await calls on 90-minutes notice for work on a railroad having no fixed freight schedule.

There was, however, proof from which it might have drawn some practical inference even without the full flavor of reality that a live record affords.

The record of one petitioner for the year 1968 was before the Court on the railroad's motion for summary judgment; in the three months from May 27 through August 24 he was on a regular assignment of 4 days in yard work and 2 days on the round trip Anchorage-Healy run; the yard work was scheduled during this

period, but even then the road call varied with every trip. During the rest of the year, the petitioner was called at every hour of the day and night, yard work also assuming the same unpatterned and unpredictable character. He ran the gamut in the two weeks beginning February 4:

On the 5th, 12:01A-8:01A; 6th, 4P-12Mn; 7th, same; 8th, called at 1:30P but not used, recalled at 4:45P-8:15A of the 9th (15'30"); 9th, 7:15P-2:10A of the 10th; 10th, 11:45A-7:30P; 11th (Sunday), 3:15P-3:30A of the 12th (12'15"); 12th, 2P-10P; 13th, not called; 14th, 12:15P-10:25P; 15th, 2:25P-2:15A of the 16th; 16th, 3A-7:05A; 3:05P-12:25A of the 17th.

Surely, the Court could not reasonably infer that the particular petitioner was doing much in the way of leisurely amusement during these two weeks, in which he worked 110 hours and was actually called at 13 different hours for 14 road and yard tours, including such unlikely hours for entertainment as 4P, 4:45P, 7:15P, 8:30P, midnight and 3A.

It is this clear proof that the railroad means what it says when it demands readiness for possible calls 24 hours a day, 7 days a week with no rest day, which renders inappropriate the analogy the Court of Claims drew from other situations in which there apparently was evidence of the use the plaintiffs there made of their on-call time. Skidmore v. Swift said that whether waiting time is work time "is a question of fact to be resolved by appropriate findings of the trial court." 323 U.S. 134, 136, 65 S.Ct. 161, 163 (1944). Here the Court of Claims declined to hear evidence, or to evaluate what was before it.

2. Petitioners were Engaged To Wait Within the Meaning of Skidmore & Swift.

Skidmore & Swift also laid down that the relevant factual evidence related to whether "the employee was engaged to wait, or . . . waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself." 323 U.S. 134, 137, 65 S.Ct. 161, 163. The Court of Claims infers from two circumstances that here the compensation was intended to cover waiting as well as task, and therefore that petitioners were waiting to be engaged: (a) that they draw no pay for waiting when they work more than 1200 miles; (b) the compensation below 1200 miles is "just another arbitrary" like "several other arbitraries that deal with waiting situations." App. 10, 49 F.2d at 927.

a. The inference from failure to pay above 1200 miles is circular.

With respect, it does not seem that the propriety of not paying after 40 hours can fairly be deduced from the very fact of nonpayment. That is the issue in the case, not the answer.

Moreover, the guaranty of 1200 miles is at the rate of 100 miles a day, and therefore for six days in each week, already beyond the 40-hour statutory limit after which overtime accrues.

b. The assimilation to other waiting-time arbitraries proves that the dual system in principle pays separately for waiting time.

The Court's assimilation of the extra-board guaranty to other allowances for waiting time in the dual system, far from undermining, establishes the contention of petitioners that they are paid to wait. It shows conclusively the intention to pay for such time in many

aspects of railroad operation. Under some circumstances, in fact, waiting time (like other nonworking time) enters into the computation of dual-system overtime. Supra, footnote 11.

The Court below is not justified in proceeding from the circumstance that it has excluded these allowances from the ordinary statutory overtime computation as nonworking time to the conclusion that they do not reflect the contractual intention to pay for waiting time as working time—which is the critical condition in the overtime provision of § 5544 that deals with on-call time. The statutory distinction is clear: Stand-by or on-call time may not qualify for ordinary working overtime, but it does qualify for its own form of overtime (after 40 hours) if separately compensated.

Here the Court's own reasoning establishes the statutory predicate.

CONCLUSION

Wherefore petitioners respectfully pray that a writ of certiorari should issue to review the decision of the Court of Claims.

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In the United States Court of Claims

No. 480-69

(Decided January 23, 1974)

WILLIAM T. ANDERSON, ET AL. v. THE UNITED STATES; UNITED TRANSPORTATION UNION, INTERVENOR

Ray R. Murdock, attorney of record for plaintiff. *Joseph A. Klausner*, *Clyde C. Houston* and *Houston & Lytle*, of counsel.

Judith Ann Yannello, with whom was *Acting Assistant Attorney General Irving Jaffe*, for defendant.

Lester P. Schoene, attorney of record for intervenor. *Edward D. Friedman*, *William H. Horkan* and *Bernstein, Alper, Schoene & Friedman*, of counsel.

Before LARAMORE and DURFEE, *Senior Judges* and NICHOLS, *Judge*.

ON DEFENDANT'S MOTION AND PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

Plaintiffs are former and present operating employees of the Government owned Alaska Railroad. They brought this action to recover overtime pay they say is owed them under 5 U.S.C. §§ 5544, 6102. The United Transportation Union has been allowed to intervene, and will be referred to as "intervenor" hereafter, though possibly it is really here as an amicus curiae. It says it is a national railway labor organization and is the authorized representative of various crafts

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of employees of the Alaska Railroad and other railroads, including all the plaintiffs. It has a contract with the Alaska Railroad including a disputes procedure, which the plaintiffs have not followed. It says the assertion of plaintiffs' claims interferes with it in the performance of its duties. Its position on the issues in litigation will be noticed hereinafter when we discuss these issues.

Plaintiffs and defendant have filed cross motions for summary judgment. There are no fact issues requiring trial. We conclude that defendant's motion should be allowed, and the petition dismissed.

Counsel are to be commended for their able exposition of the pay system under which plaintiffs operate. It has become possibly the most complex mode of calculating compensation for personal services that the mind of man has ever devised. It is best understood by an exposition of how it got that way, and we do this before discussing the issues in dispute.

Up to 1956 the Alaska Railroad used for its operating employees the dual system of compensation which we are told is common among American railroads. It denied that the then current Federal overtime laws had any application to these employees. However, in *Samples* v. *United States*, 135 Ct. Cl. 548 (1956), this court held they did apply. In that case, at p. 550, Judge Madden describes the dual system as follows:

> Under the dual system of pay, 12½ miles per hour is regarded as the standard speed of a train, and 100 miles of travel produces the same pay as eight hours of work paid by the hour. If it takes the train more than eight hours to travel the 100 miles, pay by the hour will be greater, and that computation will be used. If, as is not unusual, the train completes the journey in less than eight hours, pay by the mile will be greater and that computation will be used.

It may be added that every man's rate is stated initially as a rate per mile, and he is often said to have earned so many miles. The hourly rate is the mileage rate times 12.5. Thus a mileage rate of $.3720 is an hourly rate of $4.65. This hourly rate would govern in case of work in the yards, or switching, or on a train slower than 12.5 miles, but mileage governs for a fast, long run. If a train went 200 miles in

eight hours the man having the $.3720 rate would earn 200 times that figure, or $54.40. This would be $6.80 for each hour worked. Nevertheless, it is clear from Judge Madden's opinion and calculations in the findings that the basic hourly rate for overtime calculations was always 12.5 times the mileage, *i.e.*, $4.65 in the example given. Dual system overtime was only payable for stationary work, or on a slow train, where the advantageous mileage figure was not applicable. We are told this system was evolved to give operative railroad employees an incentive to move their trains rapidly, instead of the disincentive the straight hourly rate with overtime would supply.

The dual system also required certain extra payments to employees called "arbitraries", and they will be so called hereinafter. The term does not, as might at first be supposed, imply any criticism as to the reasonableness or justness of payments under that head. These too were in accord with standard practice on American railroads. They involved payment as for work in certain situations where no work was performed, or else payments for actual work done within hours of actual work otherwise paid for. An example of a contract "arbitrary" is "Tie up between terminals" which is worth 100 miles, *i.e.*, 100 x the employee's mileage rate of pay. A brakeman gets 15 miles for uncoupling an airhose, which may take him one minute. "Used off assignments" is worth 100 miles added to other dual system miles earned.

This court held in *Samples* (p. 552) that the employees were entitled to extra compensation under the overtime statute whenever the actual hours worked exceeded 40 per week, and the overtime was computed at time and a half the basic rate, *i.e.*, 1½ x mileage x 12½. It held that the "arbitraries" were disregarded in ascertaining the basic hourly wage

> * * * The arbitraries are items conceded to the employees by their superiors for reasons which seemed sufficient to them, and have no relation to the policy of the forty-hour week, with overtime, * * *

For the same reason, the arbitraries were disregarded in comparing the dual compensation with that prescribed by the statute, so that plaintiffs were held entitled to judgment

for any excess of regular pay for 40 hours, actual time, plus statutory overtime, over compensation paid under the dual system, not counting arbitraries. Thus, in view of the arbitraries, the actual compensation could considerably exceed the basic hourly earnings plus statutory overtime, as a result of the decision.

The intervenor tells us it viewed our decision with some alarm. It believed the court was putting the Alaska Railroad under heavy pressure to abandon the dual system of compensation and pay a straight hourly wage, with statutory overtime, but no mileage and no arbitraries. It believed the dual system, with arbitraries, was of value to the employees, as well as to management, and that some concessions should be made to preserve it. The result of this was an undertaking in a new collective bargaining agreement providing for statutory overtime whenever it was more favorable than the dual system, but preserving the latter otherwise. It was further agreed that the arbitraries would not be added in any instance where an operating employee was paid statutory overtime rather than under the dual system. If the dual system, plus the arbitraries, produced a result exceeding the statutory system, payment would be under the dual system, with arbitraries. This is the system which, with union consent, has been effective on the Railroad since 1957, and which has permitted the payment of mileage and arbitraries to continue.

This statement, oversimplified perhaps in some respects, suffices to show the problems, the background, and the evolution in the position of the parties. We turn now to the issues placed before us in these cross motions; counsel agree that they fall under four heads.

I

Plaintiffs say that the impact of mileage upon actual hourly earnings must be fed into the computation of the basic hourly rate, which is used in computing statutory overtime. Thus, for the $.3720 per mile employee already mentioned, who serves 8 hours on a train which travels 200 miles, the basic hourly rate they say is not $4.65 but $6.80. Any

escalation in earnings resulting from the mileage system, as applied in the case of a fast train, is escalated again in any overtime that may be earned.

The intervenor says that by sustaining this contention we would destroy the dual system beyond the possibility of preservation. This is opinion, of course, but it does appear plausible and plaintiffs do not effectively refute it. They are also seeking a windfall from what they hope to show is a mistake of law, that would not have befallen them, had the Railroad construed the law correctly all along. Such windfalls are not, however, unheard of in overtime litigation, and construction of the law to avoid them is not in any way mandated. The words chosen by Congress, if unambiguous, must prevail, with narrow exceptions not here relevant.

It seems clear, also, that under plaintiffs' theory an operating employee's basic hourly rate would be a different figure for every train journey he took. Apart from overtime, complications can be imagined in other areas, as *e.g.*, in computing retirement annuities. Nor is it clear how the Wage Board could fix the wage in advance in accordance with prevailing rates, as § 5544 says it must. With a system already so complicated, additional complication is perhaps of little moment, but perhaps is to be avoided if possible.

Defendant relies heavily upon *Samples*, *supra*, where it appears hourly rates were everywhere calculated as the straight mileage rate x 12½. At p. 554, Judge Madden says the straight time rate had been calculated "commensurate" with the statute since 1915, and no recomputation of it was necessary for purposes of the case before him. It does not seem that the point plaintiffs now make was made then. He was approving, as to that particular, an administrative practice already 11 years old, and it appears another 13 years were to pass before anyone challenged it.

Plaintiffs rely on decisions as to the nature of the basic rate for overtime calculation, under the Fair Labor Standards Act, 29 U.S.C. § 207 and the Public Contracts Act, 41 U.S.C. § 35. It has been held that a bargained regular rate of pay must yield before a calculation of actual earnings per hour worked. *Overnight Motor Transp. Co.* v. *Missel*,

316 U.S. 572, 580 (1942); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945). In the last cited case there was a contract "basic rate" but an alternative piece-work rate that generally produced larger earnings and it was held the overtime must be computed on the actual hourly piece-work earnings.

Defendant says the Railroad work is not piece-work and that *Walling* v. *A. H. Belo Corp.*, 316 U.S. 624 (1942) is more similar to the facts of this case. There a basic pay was provided but there was a $40 per week minimum guarantee, only exceeded if the employee worked over 54 hours. The Administrator argued that in reality that $40 was a fixed salary for an irregular work week, but the Court held that it would not provide a rigid definition of a "regular rate" when Congress had not done so. It would allow the widest possible scope to good-faith agreements.

These early cases under the then new Wage-hour Law all involved more or less obvious subterfuges, generally a paper basic rate that rarely controlled in practice. Here, however, we have an hourly rate which actually controls the earnings for a large number of the hours worked. The Wage Board or like administrative authority that per § 5544, fixes the rate of pay, is a Government agency entitled to the presumption of regularity of official action and may not have subterfuge imputed to it. The parties, bargaining in good faith have provided a mileage rate as an incentive for taking a train speedily over a long distance. As the Court said in *Walling* v. *Belo*, at p. 635, we should not insist on an inflexible and artificial interpretation of the Act, where it will impose a pay scheme not suited to the needs of the industry as well as what the parties can agree on among themselves. Mr. Justice Frankfurther said, concurring, in *Walling* v. *Harnischfeger Corp.*, 325 U.S. 427, 433 (1945), a contract rate will be respected "provided it is not a mere artifice unrelated to wage earning actualities." We note that the statute here involved speaks in terms of a "basic" rate of pay. The word "basic" not being found in the Fair Labor Standards Act. Moreover, the latter now requires, as the statute here under

review does not, that a contract rate, if used, must be "substantially equivalent to the average hourly earnings of the employee." § 207 (g) (3).

Plaintiffs' argument proves too much in the sense that if they are right, surely arbitraries too ought to be cranked into the computer to find the basic hourly rate. This would be clearly contrary to *Samples* and plaintiffs do not even urge it here.

Though the point is far from being frivolous, we conclude on the whole that defendant and intervenor are right, plaintiffs wrong. We regard the issue as more or less *res integra*, authorities cited dealing with wholly different fact situations, and laws written to overcome subterfuges not found in direct Government operation and employment, such as we have here. We are told the dual system of compensation, here involved, is similar to that which obtains on privately owned railroads. Yet the courts have not had to grapple with the issues we have here, because the Fair Labor Standards Act and any like wage-hour and overtime legislation do not apply to operating railway workers. We are certain that in including employees of Government owned railroads within the coverage of Government employee overtime legislation, the Congress did not wish to disrupt a system of compensation worked out in bona fide collective bargaining, suited to the needs of the industry, and acceptable to the employees. In statutory construction, unless the language is compelling, as it signally here is not, it is well to avoid interpretations no one can believe the Congress could have intended. The occasional instances of Congress inadvertently saying the wrong thing raises problems for courts which happily do not confront us here. The language is general and indicates an expectation that the courts will give it a rational and workable meaning in the infinitive variety of forseeable and unforseeable circumstances, and that we try to do here.

II

The next issue relates to arbitraries. As we have seen, the judgment in *Samples* was that they were neither basic pay nor overtime. In determining whether pay under the dual

system satisfied the overtime statute, arbitraries were not counted. The right of the employee to benefit from them was the same, whether his pay was set under the dual system, or under the statute. However, in contract negotiations after *Samples* the union, to save the arbitraries, agreed in effect to waive them whenever compensation was awarded under the statute, and in comparing dual system and statutory compensation, to see which was more favorable, arbitraries would be counted only on the dual system side. The plaintiffs argue that this agreement was obtained by coercion, because they lacked the right to strike, but intervenor scoffs at this. A triable issue of fact is not presented because a pay system that otherwise satisfies the statute would not do so any the less if established by the employer's unilateral fiat, and on the other hand, a pay system that violates the statute is not saved if the employees agreed to it. In construing the statute, in marginal cases, as indicated above, the factor of bona fide agreement may have weight, but we do not deem the instant dispute to deal with such a marginal issue.

Both sides agree *Samples* is the law, and no overruling or modification is suggested. It does indeed appear to us well thought out and manifestly sound. Both parties base their positions as to this issue on *Samples*. Plaintiffs say, of course, that *Samples* gave the employee a right to arbitraries even when receiving statutory overtime. The agreement subsequent to *Samples*, therefore, attempted to waive a statutory right. In effect, the use of arbitraries in computing compensation to *Samples* plaintiffs, is by this view frozen into the law. Defendant says, if plaintiffs receive their basic pay, correctly computed, with time and a half for hours over 8 a day and 40 a week, the statute is satisfied. Since, as quoted above, this court held that the arbitraries have nothing to do with the policy of the statute, clearly the statute leaves the parties free to abolish arbitraries, or continue them as before, or modify their incidence, as they may agree or as the employer may decree, in the absence of agreement. Plaintiffs in the *Samples* case, who got statutory overtime and also arbitraries, did so because there was at that time no agreement, custom, or practice, making arbitraries other than

uniformly applicable. Now there is. There is no law cited to us that an employer who concedes a statutory right may not partially recompense himself by curtailing benefits in other areas not prescribed by statute. If his position had the look or smell of assessment of a penalty for assertion of the right, that might be a different question, as to which we express no opinion, but that is not the situation here. The employees' bargaining representative made the agreement he did to save a system of compensation he thought more advantageous to the employees than the statutory system. Actually, plaintiffs' concession in *Samples*, and again here, that arbitraries are not cranked into the computation of the basic hourly wage, makes their position here untenable. If they don't get into the case by that route, there is no rational way they can get into it at all.

III

A further issue concerns the arbitrary known as the bi-weekly guarantee. A guarantee of pay for not less than 1200 miles per two week pay period at freight service rates is given to the Railroad's "Extra Board" employees. It is considered desirable to be on "Extra Board" and employees assert seniority to get on it. Plaintiffs are or have been on it. In exchange for such guarantee the employees participate in an on-call arrangement, where they are free to come and go as they please, as long as they report for work on 90 minutes notice at anytime of day. The 1200 mile guarantee is set off against all compensation actually earned, including arbitraries, straight time and overtime. If an employee should miss a call he is penalized 100 hours pay, held off the Extra Board for 24 hours and placed at the bottom of the Extra Board rotation roster. He is not called again until his name comes upon the list. If he repeatedly misses calls he is subject to discipline.

Plaintiffs contend that hours of on-call time (*i.e.*, awaiting calls) on Extra Boards exceeding 40 a week should be compensated for at overtime rates under 5 U.S.C. § 5544, since Extra Board employees are in substance engaged to wait. They argue that a trial judge should take evidence on the issue of whether or not Extra Board employees are engaged

to wait. Cited as authority are *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944). Defendant argues that based on this court's decisions it is entitled to judgment as a matter of law.

In *Aldridge* v. *United States*, 202 Ct. Cl. , , 479 F. 2d 1365, 1367 (1973), Trial Judge White said in language the court adopted as its own *Per Curiam:*

> * * * it is my opinion that considerable violence to the English language would be done by a holding to the effect that the plaintiffs were engaged in "work" for the Government while they were attending church services, or making purchases at grocery stores, or watching shows at theatres, or visiting the homes of friends, or entertaining friends in their own homes or pursuing hobbies at hobby shops, or swimming at swimming pools, or participating in social activities at social clubs, or playing golf at golf clubs, or getting haircuts, or bowling at bowling alleys, or carrying on in their own homes whatever activities in the way of recreation, diversion, or relaxation that might suit their fancy.
>
> The plaintiffs' situation is readily distinguishable from that involved in other cases where employees were required to remain at a specific place designated by the employer while awaiting a possible need for their services, and the courts held that the waiting time, although not productive, constituted compensable hours of work (*e.g.*, *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); [other cities omitted]).

Plaintiffs distinguish the *Aldridge* case on the ground that there the claimants got no pay for waiting for a call, *per se*. Here, they assert, they do, making their waiting compensable work. There is, however, no pay for waiting in the instances which must be the majority, where work over 1200 miles is actually done. If less than 1200 miles is done and an extra payment is made to satisfy the guarantee, it is just another arbitrary, already held (see above) to have nothing to do with the policy of the overtime law. There are, indeed, several other arbitraries that deal with waiting situations. Such an arbitrary does not suffice to transform nonworking into working time; the Federal law on overtime deals with realities.

IV

The last issue relates to the calculation of the number of overtime hours where some are admittedly performed. It is another *res integra* issue and it rises out of the text of the overtime law, as amended in 1962, too recently for authoritative court interpretation to be available to us on the issue involved. By 5 U.S.C. § 5544(a) compensation for a Wage Board or similar employee is for "overtime work in excess of 8 hours a day or 40 hours a week". Before amendment by the Work Hours Act of 1962, Pub. L. 87–581, only work in excess of 40 hours a week was compensable. The question can be stated as whether hours that are overtime because of the 8 hour provision are nevertheless counted in determining when the 40 hour weekly figure is exceeded. For example, suppose an employee works as follows:

Monday	10 hours
Tuesday	8 hours
Wednesday	8 hours
Thursday	8 hours
Friday	8 hours

Both sides concede that he worked two overtime hours on Monday. However, per defendant, these two hours, the ninth and tenth, are excluded from the "regular" hours and these being 8 hours each day, the 40 hour weekly maximum is not exceeded, and the employee earns two overtime hours only. Per plaintiff, however, the allowed 40 hours weekly are used up upon completion of the sixth hour Friday, and the seventh and eighth hours that day are also overtime, making four hours in all. Intervenor supports plaintiff on this issue, though saying it would not have intervened for this issue alone.

Questioning from the bench revealed that plaintiffs and intervenor would interpret the statute differently in another situation. Vary the illustrative case given above as follows:

Monday	8 hours
Tuesday	8 hours
Wednesday	8 hours
Thursday	8 hours
Friday	10 hours

Plaintiffs would claim for two hours only, conceding that the last two on Friday were the only ones entitling the worker to overtime compensation. Intervenor would make a double award, triple time apparently, for these two hours, converting them into four, as they represented excess over both the allowable daily and weekly hours. Thus, per plaintiffs, the worker would lose two hours overtime pay by the happenstance of the 10 hour day being Friday instead of Monday, while intervenor would correct this by a somewhat startling gloss on the statute. Of course, the illustration gives defendant no problems.

According to counsel's surmise, defendant's interpretation of the statutory language results from the conceptual difficulties, as illustrated above, that ensue if defendant's interpretation is abandoned. At any rate, there can be no doubt that defendant has interpreted similar language in other statutes as it now does the statute here involved. Thus Department of Labor Rulings and Interpretations No. 3 (Jan. 31, 1961) is quoted, construing the Public Contracts Act, as saying that if an employee under that Act has worked ten hours a day for six days he has worked 20 hours overtime. Under plaintiffs' view herein, of course, it would be 28.

It would appear to accord the statute an interpretation according to its terms to compute overtime earned each week by the day, taking the sum of the hours worked over 8 in any days, then by the week, the total of hours worked in the week over 40, and then award the employee the larger figure. In any event, the plaintiffs' interpretation cannot be correct and must be rejected. The daily and weekly figures surely cannot simply be added together, whether or not the happenstance is that the hours counted in the daily and in the weekly figures are the same hours. It is absurd that the employer should sacrifice his ability to get forty hours work at the regular rate if he calls for overtime at the beginning of the week, but not do so if he calls for it at the end. Statutes must, if their text permits, and sometimes even when it doesn't, be construed to avoid absurd and whimsical results, unrelated to the Congressional purpose. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892). The Congress might possibly have intended in overtime legislation of the 1930's to compel the employer to spread the work around to the maxi-

mum extent feasible, by heavy pecuniary penalties for failing to do so, but it is hardly to be supposed it intended to penalize the United States Government in 1962. The 1962 amendment was, we believe, primarily to benefit the members of the Government's work force, not to compel the parcelling out of portions of their work among strangers.

In view of the foregoing, defendant has not incurred liability to make overtime payments to the plaintiffs in any of the four ways discussed above. Plaintiffs' motion for summary judgment is denied. Defendant's motion for summary judgment is allowed. The petition is dismissed.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF FOR INTERVENOR IN OPPOSITION

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BRIEF FOR INTERVENOR IN OPPOSITION

OPINION BELOW

The decision below appears in 490 F.2d 921 (Ct. Cl. 1974). A copy of the decision is attached to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

REFORMULATION OF QUESTIONS PRESENTED

The questions as formulated by Petitioners, in our view, are argumentative and insufficient, tending both to overstate and to beg the questions presented by this

case. Since the issues which this Court is asked to review are for that reason somewhat obscured, we have restated the questions in the following form:

1. Whether the basic hourly rate of pay of the Alaska Railroad operating employees,[1] as fixed and adjusted from time to time, in accordance with the prevailing wage system in the industry, by the Secretary of Transportation in negotiation with Intervenor, acting as the recognized collective bargaining representative of such employees, all as contemplated by the Alaska Railway Act of 1914[2], is the actual hourly rate of pay upon which to compute premium pay for overtime hours under 5 U.S.C. § 5544.

2. Whether the Secretary of Transportation and the Intervenor acting as the recognized collective bargaining representative of the operating employees of the Alaska Railroad in establishing and maintaining a system of pay through collective bargaining in accordance with the prevailing wage system in the industry as contemplated by the Alaska Railroad Act may agree that the weekly wage of the operating employees should be determined upon the basis of the number of hours worked each work day and each work week multiplied by the basic hourly rate of pay with premium pay of one and one-half times such basic hourly rate for overtime hours or by a dual system of pay based upon the mileage rate, multiplied by the number of miles traversed each work day and each work plus payment for arbitraries as defined in the

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[1] The Locomotive Engineers, Locomotive Firemen, Conductors, Brakemen, Baggagemen and Hostlers.

[2] Act of March 12, 1914, 38 Stat. 305, 43 U.S.C. § 975.

collective bargaining agreement, whichever of the two is higher.

3. Whether on-call time under the extra-board arrangement constitutes hours worked for the purposes of determining whether hours worked by the extra-board employees exceed 40 hours in a work week within the meaning of 5 U.S.C. § 5544(a).

4. Whether the overtime provisions prescribed by 5 U.S.C. § 5544 are satisfied by the payment of premium pay for all hours exceeding eight in any work day or 40 in any work week, whichever is greater.

STATUTES INVOLVED

The pertinent provisions of Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 486; Pub. L. 90-83, Sec. 1(26)(A), Sept. 11, 1967, 81 Stat. 200; 5 U.S.C. § 5544 are set forth in the Petition at pp. 3-4. Also involved in this matter are the following statutes:

Act of Mar. 12, 1914, c. 37, § 1, 38 Stat. 305, 43 U.S.C. §§ 975, 975f.

> 43 U.S.C. § 975. "Alaskan railroads; location, construction, and operation; passes.
>
> "The President of the United States is empowered, authorized, and directed to adopt and use a name by which to designate the railroad or railroads and properties to be located, owned, acquired, or operated under the authority of sections 975 to 975(g) of this title; to employ such officers, agents, or agencies, in his discretion, as may be necessary to enable him to carry out the purposes of said sections; to authorize and require such officers, agents, or agencies to perform any or all of the duties imposed upon him by the terms of said sections; . . . to receive compensation for the transportation of passengers and

property, *and to perform generally all the usual duties of a common carrier by railroad;* to make and establish rules and regulations for the control and operation of said railroad or railroads; (Emphasis supplied.)"

43 U.S.C. § 975f. "Same; authority of President.

"It is the intent and purpose of Congress through the provisions of sections 975 to 975g of this title to authorize and empower the President of the United States, and he is fully authorized and empowered, through such officers, agents, or agencies as he may appoint or employ, to do all necessary acts and things in addition to those specially authorized in said sections to enable him to accomplish the purposes and objects of said sections."

Pub. L. 89-670, § 6, Oct. 15, 1966, 80 Stat. 937, amended Pub. L. 92-401, § 6, Aug. 22, 1972, 86 Stat. 617, 49 U.S.C. § 1655(i).

"Alaska Railroad.

"(i) The administration of the Alaska Railroad, established pursuant to the Act of March 12, 1914, as amended (38 Stat. 308), and all of the functions authorized to be carried out by the Secretary of the Interior pursuant to Executive Order Numbered 11107, April 25, 1963 (28 F.R. 4225), relative to the operation of said Railroad, are hereby transferred to and vested in the Secretary of Transportation who shall exercise the same authority with respect thereto as is now exercised by the Secretary of the Interior pursuant to said Executive order."

RESTATEMENT OF THE CASE

Petitioners are current or former extra-board operating employees of the Alaska Railroad (hereinafter the "Railroad"), who have been paid pursuant to collective bargaining agreements negotiated by the Railroad and by the Intervenor, the United Transportation Union, acting on behalf of the operating employees as their recognized representative. Historically, the wage fixing authority for the Railroad (the Secretary of Interior prior to October 15, 1966,[3] and the Secretary of Transportation thereafter[4]) has followed the collective bargaining processes governing labor relations in the railroad industry in accordance with the mandate in the Alaska Railway Act "to perform generally all the usual duties of a common carrier by railroad", 43 U.S.C. § 975. Thus, the Alaska Railroad has conformed its classifications and its pay scales to the practices of the railroad industry. Specifically, in its negotiations with Intervenor it has coordinated its wage system with that prevailing on the Northern Pacific Railroad, adjusted by a cost of living differential reflecting differences between the Alaska areas and the various cities in the Continental United States. The rates prescribed by the collective bargaining agreement covering Petitioners and the other operating employees of the Railroad are in this way derived from the wage system prevailing in the

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[3] Pursuant to Executive Order No. 11107 of April 26, 1963, 28 F.R. 4225, superseding Executive Order No. 3861 of June 8, 1923.

[4] The administration of the Railroad in all functions to be carried out by the Secretary of the Interior were transferred to and vested in the Secretary of Transportation. Pub. L. 89-670, § 6, October 15, 1966, 80 Stat. 937, 49 U.S.C. § 1655(i).

collective bargaining agreements with the Northern Pacific Railroad.

The decision of the Court of Claims in *Samples* v. *United States,* 135 Ct. Cl. 538 (1966) required a variation from the pattern which had existed prior to that time. It was upon this basis that the Roalroad and the Intervenor shortly thereafter modified their historic wage system to accommodate the two distinct pay systems contemplated by the *Samples* decision: first the "dual pay system" (that which prevails in the railroad industry and which has been consistently followed by the Alaska Railroad) which is made up of a system of payment for miles run, hours worked, overtime hours, and "arbitraries"; and second the "statutory system" which provides for a payment of the employees' basic hourly rate of pay and the payment of one and one-half times the basic hourly rate of pay for hours worked in excess of eight hours a day or 40 hours a week, whichever is greater. The computations of pay earned under the dual or mileage system with its arbitraries and the statutory system with time and one-half for overtime hours are compared on a weekly basis; the employee is paid the larger of the two sums. This assures that the employee will be paid at least as much as the amount set out in 5 U.S.C. § 5544 and at the same time preserves and maintains the historic wage system prevailing throughout the American railroad industry.

The dual wage system was characterized by the Court of Claims in its decision below as "possibly the most complex mode of calculating compensation for personal services that the mind of man has even devised" (Appendix to Petition at p. 2). It represents approximately a century of experience in the railroad industry

in developing a wage system which reflects the unique and special conditions of employment in rail transportation. Essentially it is a method of compensating railroad employees upon the basis of a rate for miles run or hours worked, whichever is greater, computing the basic day of eight hours to be 100 miles and the hourly rate of pay to be twelve and one-half times the rate of pay for one mile. Trains may run fast or slow and time on a run may be lost in terminals, breakdowns, switching operations or in other similar circumstances. Trains frequently may cover substantially more or substantially less than 100 miles in any one day. If more than 100 miles are covered, the employee is paid for actual miles run. If less than 100 miles are covered in an eight-hour day, the employee is paid by hours which for payroll purposes are converted to miles on the basis of the formula prescribing twelve and one-half miles for each hour.

In addition to the payment of mileage or hours, the collective bargaining agreement covering Petitioners and other operating employees of the Railroad provides as a part of the wage system a wage component designated "arbitraries" which are payable in a number of circumstances arising in the operation of the railroad, in accordance with the standard practice of American railroads. Arbitraries include payment for dual system overtime premium pay, additional work performed which the employee is not ordinarily required to perform, compensation for not having work available when the employee is scheduled to work under the work rules and payments for inconveniences or penalties in various other circumstances.

The payment of arbitraries is an integral part of the dual wage system which has become thoroughly estab-

lished in the railroad industry. Following the *Samples* decision, the Railroad and the Intervenor agreed in collective bargaining, that arbitraries would be retained as a component of the dual wage system, but would not be included in compensation for those weeks in which compensation was due and payable under the statutory system. Thus, under the terms of the collective bargaining agreement, compensation earned under the dual system including arbitraries during any given work week is compared with compensation payable under the statutory system, and the higher of the two sums is paid to the employees for such period.

ARGUMENT

I. The Issues Presented by the Petition Do Not Involve Questions of Importance to the Administration of Any Federal Statute.

The decision of the Court of Claims in this case is limited in its application to the employees of the Alaska Railroad and can hardly be characterized as involving a question of importance to the administration of 5 U.S.C. § 5544. As pointed out by the Court of Claims, the wage system in the railroad industry is "possibly the most complex" ever devised by the mind of man and its juxtaposition to the Federal overtime statute is confined to the facts of this case alone. The manner in which the Federal overtime law affects the dual wage system prescribed by the collective bargaining agreement covering the operating employees of the Alaska Railroad was considered by the Court of Claims in *Samples* v. *United States, supra,* in which the Court established the basis for an accommodation of the two wage systems, preserving the one and at the same time giving effect to the policies of the other. It was there held that the statute in its application to the unique

facts of employment of operating employees of the Railroad requires no more than the payment of higher wage as computed under the respective wage systems; if the dual system produced a wage exceeding the statutory system, payment would be under the dual system; otherwise payment would be under the statutory system.

The basic hourly rate as fixed by the Railroad (by the Secretary of Interior at that time under Presidential delegation) and the collective bargaining representative of the operating employees was not challenged in *Samples* and was applied by the Court of Claims to the foregoing formula. Nor was the question of the inclusion or exclusion of arbitraries raised because, as the Court below observed, "there was at that time no agreement, custom, or practice, making arbitraries other than uniformly applicable. Now there is." (Appendix to Petition at p. 8.) Petitioners in this proceeding challenged (1) the bona fides of the basic hourly rate as established by the agreement and (2) the bona fides of the post *Samples* modified wage provision in which arbitraries were retained as a component of the dual system only.

As pointed out above, the decision of the Court of Claims in *Samples* and in its decision here interpreting and applying *Samples* is of limited impact and does not present a question of sufficient Federal significance to warrant issuance of the writ. The decision in the foregoing respect does not affect the wage system of employees employed by any other railroad or by any industry in the United States.

Nor does the on-call issue raise a Federal question of any greater significance than the questions considered above. Petitioners, as extra-board employees, are free to come and go when off duty, but they must report

to work within one and one-half hours of notice throughout the week. It has been consistently held that an employee who is not required to remain at a specific place designated by the employer while awaiting an assignment and whose liberty of movement and of activity is no more constrained than in this case is not serving in a working capacity and that, in consequence, his on-call time cannot be counted as working hours. *Aldrich* v. *United States,* 202 Ct. Cl. . . . , 479 F.2d 1365 (1973); *Detling* v. *United States,* 193 Ct. Cl. 124, 432 F.2d 462 (1970); *Rapp* v. *United States,* 167 Ct. Cl. 852, 340 F.2d 635, (1964).

The final issue raised below refers to the calculation of premium pay for daily and weekly hours. Petitioners challenged the practice of the Railroad in calculating premium pay upon the basis of daily and of weekly overtime and of including in the wage the greater of the two sums. The Department of Labor in its administration of the Public Contracts Act. (49 Stat. 2036 (1936), 56 Stat. 277 (1942), 41 U.S.C. § 35(c)) has consistently interpreted comparable overtime provisions to require the payment of the greater of daily or weekly overtime pay. See Department of Labor Rulings and Interpretations No. 3 § 42(c) (January 31, 1961). While we respectfully disagree with the Department's long time interpretation of these comparable provisions, it appears clear that this question has not been sufficiently considered by the lower courts to justify review by the Supreme Court at this time.

II. The Decision Below Is Not in Conflict with the Decisions of This Court.

The Court of Claims reviewed the various decisions of the Supreme Court under the Fair Labor Standards Act of 1938 as amended (29 U.S.C. 201), upon which

Petitioners rely and correctly concluded that its decision herein is consistent with the decisions of this Court. The cases with respect to which Petitioners claim conflict involve attempts to establish artificial or fictitious rates of pay either by contract or by practice. The basic daily rate for operating employees fixed by the agreement between the Railroad and the Intervenor, as pointed out above, reflects the rate system prevailing on the Northern Pacific Railroad as contemplated by the Alaska Railway Act. No one could possibly question the bona fides of the rates established on the Northern Pacific. The bona fides of the rates on the Alaska Railroad, derived as they are from the Northern Pacific, are no less bona fide. The rates established on the Alaska Railroad belong to the same family of rates prevailing in the Continental United States and are the result of careful and difficult negotiations over long periods of time, marked by the action of Presidential emergency boards, by litigation, and by legislation as experienced in recent years.

Where the regular hourly rate established by contract is genuine, as in this case, it forms the basis for computing overtime pay required by the Fair Labor Standards Act. As Justice Frankfurter observed in his concurring opinion in *Walling* v. *Harnischfeger,* 325 U.S. 427, 433:

> "Nor does the Act bar an agreement establishing an hourly regular rate that does not fall short of the statutory minimum even though it be complicated by a guaranteed weekly lump sum wage adapted to the circumstance of a particular employment, *provided it is not a mere artifice unrelated to wage earning actualities."* Citing *Walling* v. *A. H. Belo Corp.,* 316 U.S. 624; *Walling* v. *Helmerich and Payne,* 323 U.S. 37.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, *et al.*, *Petitioners*

v.

UNITED STATES

Certificate of Service

I hereby certify that on this 23rd day of May, 1974, three copies of the Brief for Intervenor in Opposition were mailed, postage prepaid, to Robert H. Bork, Esquire, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Joseph A. Klausner, Esquire, 1028 Connecticut Avenue, N.W., Washington, D.C. 20036, Attorney for Petitioners. I further certify that all parties required to be served have been served.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are present and former employees of the government-owned Alaska Railroad.[1] As such, they are considered government employees for purposes of the

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[1]Pursuant to the provisions of 43 U.S.C. 975, authorizing him to construct and operate a railroad in Alaska, the President, by Executive Order No. 11107 (April 25, 1963), 28 Fed. Reg. 4225, authorized the Secretary of the Interior to operate the railroad. This authority of the Secretary of the Interior was subsequently transferred to the Secretary of Transportation. 49 U.S.C. 1655(i).

The Secretary of Transportation has exercised his authority to "fix and adjust" the rate of compensation for Railroad employees by authorizing the General Manager of the Railroad to engage in collective bargaining with the railroad unions. The parties have in turn agreed "that the wage rates payable to employees of the Northern Pacific Railway [with suitable cost-of-living differential] constitute a fair and equitable pattern to be used for determining wage rates for operating employees of the Railroad." Basic Labor Agreement, par. 9.

federal overtime statute, 5 U.S.C. 5544. *Samples* v. *United States,* 135 Ct. Cl. 548. The issue in this case is whether the railroad properly computed the amount of overtime pay to which petitioners are entitled pursuant to 5 U.S.C. 5544.

1. The Alaska Railroad pay system is, according to the Court of Claims, "possibly the most complex mode of calculating compensation for personal services that the mind of man has ever devised" (Pet. App. 2). The pay system is established under a collective bargaining agreement between petitioners' union and the railroad. The agreement adopts a dual system of compensation which is commonly used in the railroad industry. Under the dual system 12.5 miles per hour is, for historical reasons, assumed to be the standard speed of a train. Each employee's pay rate is fixed by the agreement and is stated as a rate per mile (the "mileage" rate). The hourly rate is determined by multiplying the "mileage" rate by 12.5. Under this system 100 miles of travel produces pay equivalent to eight hours pay. If more than eight hours are required for 100 miles travel, the hourly rate will produce greater compensation and that rate is used. If, on the other hand, a train travels more than 100 miles in eight hours, the "mileage" rate times actual mileage traveled will produce greater compensation and that formula is used.

In addition to the dual system, the agreement also provides for certain payments known as "arbitraries". These payments are either for work in special situations where no work was in fact performed, or for work done within hours of work otherwise paid for by the basic pay rate. For example, a brakeman is accorded 15 miles credit for uncoupling an airhose even if the work required only one minute to perform (Pet. App. 3).

The relationship of the Alaska railroad pay system to the federal overtime statute was previously the subject of litigation in the Court of Claims in *Samples, supra.* In that case it was held that railroad employees were entitled to overtime under the Act whenever actual hours worked exceeded 40 per week. The court also held that the basic rate for purposes of computing overtime was the "mileage" rate (*i.e.,* the rate fixed by the agreement) times 12.5. Finally, the court determined that in computing overtime, "arbitraries" were to be disregarded. As a result of the *Samples* decision railroad employees who worked more than 40 hours per week would receive basic pay computed under the dual system on either the hourly or actual mileage formula, federal overtime computed at the rate of 1.5 times the mileage rate times 12.5, plus "arbitraries".

In the wake of the *Samples* decision the collective bargaining agreement was amended to provide that employees working in excess of 40 hours per week would receive the greater of compensation computed under the federal overtime statute or under the dual system including arbitraries. If, however, an employee receives compensation under the federal overtime statute, no "arbitraries" are paid (Pet. App. 4).

Petitioners' two primary claims relate to the dual system and arbitraries. First, petitioners contend that for purposes of the federal overtime statute basic pay must be fixed under the actual mileage formula rather than the hourly rate fixed by the agreement (*i.e.,* the mileage rate times 12.5). Second, petitioners contend that if compensation is paid under the federal overtime statute, the railroad cannot refuse to pay arbitraries.

Petitioners also press two other claims relating to so-called "Extra Board" employees and to the cumulation of time worked in excess of eight hours per day and 40 hours per week. The "Extra Board" claim is related to an arbitrary known as the biweekly guarantee which is described in detail in the Court of Claims' opinion (Pet. App. 9-10). Petitioners' cumulation claim is also discussed in detail in the Court of Claims' opinion (Pet. App. 11-12). The thrust of this claim is illustrated by the following example: if an employee worked ten hours on Monday and eight hours the remaining four days of the week, petitioners contend that he would be entitled to four hours overtime—two hours fo work in excess of eight hours on Monday and two hours for work in excess of 40 hours for the week. The United States, on the other hand, contended, and the Court of Claims held, that only two hours of overtime would result.

On cross motions for summary judgment, the Court of Claims granted the government's motion, holding that petitioners' basic hourly rate of pay (upon which the amount of overtime compensation is based) is their mileage rate multiplied by 12.5, a calculation previously approved in *Samples v. United States, supra;* that the agreement of the railroad and petitioners' union not to pay arbitraries when paying statutory overtime did not contravene 5 U.S.C. 5544; that Extra Board employees were not "on call" within the meaning of the federal overtime statute; and that the federal overtime statute grants employees overtime benefits for work in excess of 8 hours a day, or in excesss of 40 hours a week, but that the two cannot be cumulated.

2. The decision of the Court of Claims is correct, is consistent with its earlier decision in *Samples* v. *United States, supra,* and correctly interprets 5

U.S.C. 5544. No issue warranting review by this Court is presented.

a. Petitioners contend that the method for calculating overtime violates 5 U.S.C. 5544 in that the Railroad continues to utilize the standard of one hour equals 12.5 miles as the basis for calculating the basic hourly rate. It is petitioners' position that the Railroad should calculate the basic hourly rate by dividing the actual miles travelled in any one time period by the actual hours in that period, even though this method will obviously yield a different basic rate for every period.[2] There is nothing in 5 U.S.C. 5544, however, which requires the Railroad to utilize the formula advanced by petitioners in place of a formula agreed upon in *bona fide* collective bargaining negotiations. Moreover, the *Samples* court indicated that the basic hourly rate for overtime calculations of 12.5 multiplied by the mileage rate, did not contravene the federal overtime statute. *Samples* v. *United States,* 135 Ct. Cl. at 600.

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[2]The difference between the method actually utilized and the method petitioners contend should be utilized is illustrated by the following example:

Assume a rate per mile of $.3720. The Railroad obtains the basic rate by multiplying this figure by 12.5 to obtain an hourly rate of $4.65. To the Railroad, this represents the "basic rate" for purpose of the statute and the overtime rate would be equivalent to one and one-half times $4.65.

This method should be compared with the method petitioners contend should be utilized. Assume an employee who works on a train which travels 200 miles in eight hours. At the same rate per mile utilized above, the employee would earn $74.40. If this figure is divided by 8, the actual hours consumed in the trip, the hourly rate would amount to $9.30 for each hour worked (Pet. App. 2-3).

Petitioners' reliance (Pet. 13) upon cases arising under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, is misplaced. The principles regarding overtime compensation in that Act are expressly made inapplicable to railroad employees such as petitioners. 29 U.S.C. 213(b). Moreover, those principles were not violated here.The Fair Labor Standards Act does not prohibit an employer and its employees from establishing the regular wage rate by contract. *Walling* v. *Belo Corp., 316 U.S. 24.* The only issue presented in the cases petitioners cite was whether the contract rate was designed to circumvent the Act. See, *e.g., Walling* v. *Helmerich & Payne,* 323 U.S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419. Here, the Court of Claims correctly held that the contract at issue was not a subterfuge to evade the requirements of the statute (Pet. App. 6).[3]

b. With respect to the non-payment of arbitraries when the compensation due computed pursuant to the statute exceeds the compensation due pursuant to the dual system, the Court of Claims correctly held that arbitraries are not required by the statute.

The purpose of the statute is to ensure payment at the basic rate for non-overtime hours actually worked and at one-and-a-half times the basic rate for overtime hours actually worked. In *Samples, supra,* the Court of Claims held that arbitraries are not related to this statutory policy since they do not, in major part, relate to hours worked. Petitioners admit that, at the very least, arbitraries "usually" do not represent payment for hours actually worked (Pet. 25).

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[3]As the Court of Claims found, the hourly rate at issue actually controls the earnings for a large number of the hours worked (Pet. App. 6).

c. The Court of Claims properly held that the Railroad may count as weekly overtime hours the total number of hours in excess of eight worked each day, or the number of hours in excess of forty worked in that same week, whichever is greater, but not both.

Petitioners' reliance on the Contract Work Standards Act, 40 U.S.C. 327 *et seq.* (referred to in the petition as the "Work Hours Act of 1962"), is misplaced. Indeed, that Act supports the decision of the Court of Claims. The terms of that Act—which provide for over-time compensation for daily hours in excess of eight or weekly hours in excess of forty "as the case may be"—show that Congress intended overtime compensation only for the greater of the total number of daily hours in excess of eight or the number of weekly hours in excess of 40, the rule followed by the Railroad here. See H. Rep. No. 1553, 87th Cong., 2d Sess., pp. 5-6.[4]

Moreover, when the Contract Work Standards Act was passed, Congress was familiar with the settled practice of the Department of Labor in administering the Walsh-Healy Act, 41 U.S.C. 35(c). The regulation cited by petitioners, 41 C.F.R. §50-201.103(c),[5] (Pet. 30), was promulgated in its present form almost from the very

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[4]The purpose of the Contract Work Standards Act was to establish the 40 hour week as the basic work week for work performed under contract with the federal government. See S. Rep. No. 1722, 87th Cong., 2d Sess., p. 2. As noted above, the Act requires overtime compensation for daily hours in excess of 8 hours or weekly hours in excess of 40 hours "as the case may be". Section 201 of the Act amended the federal overtime statute in order "* * * to bring [the federal overtime statute] into conformity with the policy of Title I of [the Contract Work Standards Act]." *Id.* at p. 12.

beginning of the Act, see 7 Fed. Reg. 4494, and has been consistently interpreted by the Department of Labor as requiring overtime compensation only for the greater of the total number of daily hours in excess of eight or the total number of weekly hours in excess of forty. See, *e.g.*, Rulings and Interpretations No. 3, §42(c) (January 31, 1961). Congress has never questioned either this interpretaton of the Walsh-Healy Act or the regulation cited by petitioners.

d. The Court of Claims correctly held that Extra Board employees were not engaged in work entitling them to overtime compensation. As the Court of Claims noted, the 1200 mile guarantee given Extra Board employees did not constitute payment for being on call, but merely was another arbitrary. Given that fact and the fact that Extra Board employees are free to do as they please while on Extra Board status, the Court of Claims correctly concluded that petitioners were not engaged to wait and that, therefore, the statute did not require overtime compensation.[5]

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[5]This regulation, in relevant part, provides:

> * * * overtime shall be computed after 8 hours in any one day or after 40 hours in any one week *during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.* [Emphasis supplied.]

[6]The statute requires the payment of overtime compensation only to on-call employees required to remain within the confines of their post of duty. Petitioners do not contend that Extra Board employees are required to remain within the confines of their post of duty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.